95-1094

No.

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

DARLENE BANFIELD, Executrix of the Estate of Harlow F. Banfield, et al.,
Petitioners,

v.

KENNETH W. TURNER, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION OF FRANCIS P. GALLAGHER AND THOMSON PLAN ADMINISTRATION COMPANY TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Is summary judgment appropriate when the petitioners have failed to present any evidence that any fraud, breach of contract or misappropriation was caused by the respondents?

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The petitioners brought a cause of action against Francis P. Gallagher and Thompson Plan Administration Company and thereafter Francis P. Gallagher and Thompson Plan Administration Company moved for summary judgment. The Trial Court held although there was a question of fact as to whether Francis P. Gallagher or Thompson Plan Administration Company was a fiduciary, the plaintiff failed to present any evidence controverting Gallagher and Thompson Plan Administration's assertion that they did not direct, act or conspire with regard to the acts complained of in the Complaint. [J.A.32]

Thereafter, the petitioner appealed the Trial Court's ruling to the Sixth Circuit Court of Appeals which resulted in a *de novo* review by the Court. [J.A.8] The

Court of Appeals found that the District Court was correct that Mrs. Banfield had not shown a genuine issue of material fact on the allegations of breach of fiduciary duty. The Court further found that the defendants supported their summary judgment motions with affidavits and deposition testimony. Finally, the Court found that Mrs. Banfield presented no evidence that any fraud, breach of contract or misappropriation occurred. [J.A.11 and 12]

SUMMARY OF ARGUMENT

The petitioners have not presented any special and important reasons for this Court to review the granting of summary judgment on the decision of the Trial Court. The petitioners have not shown that the decision of the Court of Appeals is in conflict with the decision of another United States Court of Appeals, or that the decision by the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

ARGUMENT

The Petition for Writ of Certiorari filed by the petitioners fails to demonstrate any special or important reason why this Court should grant the within Petition for Writ of Certiorari. The petitioners have not demonstrated that this decision by the Sixth Circuit Court of Appeals in any way is in conflict with the decision of another United States Court of Appeals on the same matter. The petitioner makes reference to the decision in ***Martuccio v. Comm.*** (1994 CA 6), 1994 UAPP Lexis 19204. However, a review of the within decision will

indicate that the decision of the Sixth Circuit Court of Appeals is not in conflict with the within decision and does not have any application to the issues raised in this case.

The respondents, Francis P. Gallagher and Thompson Plan Administration Company, properly filed a Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and supported said Motion with the affidavit of Francis P. Gallagher. The petitioners failed to place before the Court any evidence that there was fraud, breach of contract or misappropriation. All the petitioners are attempting to do is again request a reviewing Court to review the appropriateness of having the Trial Court grant summary judgment in favor of the respondents, Francis P. Gallagher and Thompson Plan Administration Company. This review was thoroughly conducted by the Court of Appeals. The petitioners have failed to demonstrate any special or important reason for this Court to grant the within Petition for Writ of Certiorari.

CONCLUSION

The petitioners have failed to demonstrate any reason as to why this Court should grant the Petition for Writ of Certiorari when summary judgment was properly granted in favor of the respondents, Francis P. Gallagher and Thompson Plan Administration Company.

Francis P. Gallagher and Thompson Plan Administration Company

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